NO. 84-1160

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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BERTOLD J. PEMBAUR, M.D.,
Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DECOURCY, JR., and HON. ROBERT A. TAFT, II,
Respondents,

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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24 pp

## QUESTION PRESENTED FOR REVIEW

CAN THE SINGLE, DISCRETE STATEMENT OF A COUNTY PROSECUTOR IN GIVING ADVICE TO A DEPUTY SHERIFF CONSTITUTE THE IMPLEMENTATION OF A COUNTY POLICY SO AS TO RENDER A COUNTY LIABLE UNDER 42 U.S.C. § 1983.

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## IN THE
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CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DECOURCY, JR., and HON. ROBERT A. TAFT, II,
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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

### OPINIONS BELOW

The Opinion of the Court of Appeals, filed on October 18, 1984, is reproduced in Appendix A. The Findings of Fact, Opinion and Conclusions of Law of the United States District Court filed on April 5, 1983, is reproduced in Appendix B to the Petitioner's Brief.

### JURISDICTION

The Judgment of the Court of Appeals was entered on October 18, 1984. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

### CONSTITUTION OF THE UNITED STATES: FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### FOURTEENTH AMENDMENT

**Section 1. Citizens of the United States**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### 42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of



Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended December 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284).

## STATEMENT OF THE CASE

In April, 1977 the Grand Jury in Hamilton County, Ohio, began an investigation of the Petitioner, Bertold J. Pembaur, M.D., involving his Rockdale Medical Center During the investigation two employees of Dr. Pembaur, Marjorie McKinley and Kevin Maldon, were directed to appear before the Grand Jury, but they failed to appear. Subsequent to their failure to appear, two separate judges of the Court of Common Pleas of Hamilton County, Ohio issued *capiases* for the arrest and detention of each witness. A *capias* was issued by Judge Robert S. Kraft on April 29, 1977 for Kevin Maldon and a *capias* was issued by Judge Robert H. Gorman on May 19, 1979 for Marjorie McKinley. (Joint Ex. II and III, Tr.p. 134).

On May 19, 1977, at approximately 2:00 p.m., Hamilton County Deputy Sheriffs Frank Webb and David Allen attempted to serve the *capiases* on Marjorie McKinley and Kevin Maldon at the Rockdale Medical Center, their usual place of employment (Tr.p. 49, 138). The two Deputy Sheriffs showed their identification but were denied admittance by Dr. Pembaur who not only closed the door, but also barricaded the door with a piece of wood. (Tr.p. 51.)

Dr. Pembaur called the Cincinnati Police Department and the news media to his office. After discussions with the County Sheriff's office and the County Prosecutor's office, the Deputy Sheriffs attempted to force the door but

they were unsuccessful. A Cincinnati Police Officer then took an axe and chopped a hole in the door. (Tr.p. 54.) Neither Marjorie McKinley nor Kevin Maldon were found although Marjorie McKinley was hiding on the premises and Kevin Maldon was probably on the premises. (Tr.p. 138, 139, Petitioner App. B, p. 18a). At no time did the County Prosecutor appear at the scene of the incident described above.

The Petitioner commenced an action pursuant to 42 U.S.C. § 1983 in the Southern District of Ohio, Western Division. The Trial Court ruled in favor of all Defendants and dismissed the Petitioner's Complaint.

The Sixth Circuit Court of Appeals affirmed the Trial Court's Decision as to Hamilton County, Ohio, but reversed as to the City of Cincinnati. The Sixth Circuit Court held that the Petitioner had suffered no constitutional deprivation at the hands of Hamilton County. The Petitioner failed to prove that he had suffered any constitutional deprivation pursuant to any policy, custom or practice of Hamilton County, Ohio.

From the Decision of the Sixth Circuit Court of Appeals the Petitioner has initiated the present action in this Court.



## REASONS FOR DENYING THE WRIT

### THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT A COUNTY POLICY IS NOT IMPLEMENTED BY A SINGLE, DISCRETE DECISION BY A COUNTY PROSECUTOR SO AS TO IMPOSE LIABILITY ON THE COUNTY UNDER 42 U.S.C. § 1983.

The Petitioner seeks to have this Court grant the Writ of Certiorari to consider whether a single, discrete decision by a County Prosecutor can be an implementation of a County policy so as to make the County liable under 42 U.S.C. § 1983 and the decision in *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

The Respondents believe that the Sixth Circuit Court of Appeals properly recognized and held that a single, discrete decision by the County Prosecutor is insufficient, by itself, to establish that the Prosecutor was implementing a County policy. (Appendix A at 8a).

The single, discrete decision which the Petitioner is relying upon is an alleged hearsay statement made by the County Prosecutor to the Deputy Sheriffs to "go in and get them" in the execution of the capiases for the arrest of two employees of the Petitioner in May 19, 1977.[1] The Prosecutor was not at the scene of the incident and had no other participation other than making a comment over the telephone.

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[1] The validity of the issuance and execution of the capiases involved was upheld by the Ohio Supreme Court in *State of Ohio* v. *Pembaur*, 9 OhioSt.3d 136 (1984) and was before this Court in the case of *Pembaur* v. *State of Ohio*, cert. denied, 104 S.Ct. 2668 (Case No. 83-1656, 1984).

At the time of the incident on May 19, 1977 court decisions in Ohio and the Sixth Circuit had held that arrest warrants could be executed at the home of a third person not named in the warrant without a search warrant. *United States* v. *McKinney,* 379 F.2d 259 (6th Cir. 1967). Further, Section 2935.12, Ohio Revised Code, permitted an officer to break down a door if the officer was refused admittance when executing an arrest warrant. The Prosecutor's policy of giving advice based upon what state and federal law permitted at the time surely should not be an unconstitutional policy on the part of the Prosecutor which somehow becomes the policy of Hamilton County, Ohio.

Further, such an isolated single statement by the County Prosecutor should not rise to the level of an unconstitutional policy on the part of Hamilton County, Ohio. Even assuming *arguendo* that the County Prosecutor's advice was illegal or unconstitutional, such a single incident should not establish County policy. *Turpin* v. *Mailet,* 619 F.2d 196 (2nd Cir., 1980) cert. denied 449 U.S. 1016 (1980). *Berry* v. *McLemore,* 670 F.2d 30, 32 (5th Cir., 1982).

Simply because a County official could set a County policy, every decision by that County official is not a "policy" of the County for which the County could be held liable under 42 U.S.C. § 1983. The Petitioner must not only establish that a single decision is a County policy, but also that the particular injury was incurred because of that policy. *Bennett* v. *City of Slidell,* 728 F.2d 762, 767 (5th Cir., 1984).

In *Rowland* v. *Mad River Local School District,* 730 F.2d 444, 451 (6th Cir., 1984), the Court held that there was no evidence that the single, discrete decision of the



school superintendent to suspend a teacher was the execution of a policy or custom for which the school district could be liable under 42 U.S.C. § 1983, even assuming that the school superintendent could set school board policy.

In the case before this Court, the Petitioner has failed to clearly establish that the hearsay statement of the County Prosecutor was a County policy and that the County policy thus established caused a constitutional deprivation. To accept the Petitioner's argument would mean that every decision and every statement made by a County official would establish County policy which could subject the County to liability under 42 U.S.C. § 1983.

The decision urged by the Petitioner would clearly go far beyond what was envisioned in *Monell, supra.* The one occasion on which the Prosecutor's office gave advice to the Sheriff's deputies in accordance with existing law should not be sufficient to establish that the Prosecutor was implementing a governmental policy for which the County could be liable under 42 U.S.C. § 1983.

## CONCLUSION

For the reasons set forth above, the Respondents believe that the Decision of the Court of Appeals for the Sixth Circuit should be affirmed and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3325

BERTOLD J. PEMBAUR, M.D.,
Plaintiff-Appellant,

v.

CITY OF CINCINNATI; HAMILTON COUNTY; HON. NORMAN MURDOCK, COUNTY COMMISSIONER; HON. ROBERT A. TAFT, II, COUNTY COMMISSIONER; WILLIAM P. WHALEN, JR.; AND RUSSELL L. JACKSON,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed October 18, 1984

Before: KENNEDY and JONES, Circuit Judges; and COHN, District Judge.*

JONES, Circuit Judge. This matter is before the Court on the appellant's appe[illegible] from the district court's order dismissing his civil righ[illegible] action under 42 U.S.C. § 1983.

* The Honorable Avern Cohn, United States District Court for the Eastern District of Michigan, sitting by designation.

The appellant, Bertold J. Pembaur, a licensed doctor specializing in family medicine, maintains an offiice known as the Rockdale Medical Center (Center), which is located at 430 Rockdale Avenue in Cincinnati. During the spring of 1977, the Hamilton County Grand Jury indicted Pembaur in a six-count indictment. During the investigation of the charges, subpoenas were issued for the appearance of two of Pembaur's employees before the Grand Jury. These employees failed to appear at the designated time and capiases or writs of attachment were issued for their arrest.

On May 19, 1977, two deputy sheriffs from the Hamilton County Sheriff's Department appeared at the Center without a search warrant to serve the capiases which listed the employees' home addresses and not the Center's address. Upon their arrival, Pembaur refused to let them into the inner offices to search for the employees. In fact, he barricaded the door to those offices, called the press and the Cincinnati Police Department, and continued to refuse access to the inner offices.

Because of Pembaur's actions, one of the deputies called the Sheriff's office who advised him to call William P. Whalen, Jr., an assistant prosecuting attorney for Hamilton County. Simon Leis, prosecutor at the time, told Whalen to instruct the officers to serve the capiases. When the deputies were unsuccessful in their attempt to force the door, a Cincinnati police officer took an axe and chopped the door down which enabled the deputies and police officers to enter the inner offices. The employees, however, were not found.

Subsequently, Pembaur filed a civil rights action in the district court under § 1983 alleging deprivation of his Fourth and Fourteenth Amendment rights. Pembaur



named the City of Cincinnati (City), Hamilton County (County), the Hamilton County Commissioners in their official capacity (Commissioners), the Chief of the Cincinnati police department, the Hamilton County Sheriff, William Whalen, six unnamed Cincinnati police officers, two unnamed deputy sheriffs, and Russell Jackson, a Secret Service officer appointed by the county prosecutor pursuant to state law as defendants. After a bench trial, the district court made certain findings of fact and conclusions of law and, as a consequence, dismissed Pembaur's action in its entirety. On appeal, Pembaur raises only the dismissal of his claims against Whalen, the County, and the City as grounds for reversal.

In a case tried to the court, the district court's findings of fact will be set aside only if they are clearly erroneous. Fed. R. Civ. P. 52(a). A factual finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Kennedy* v. *Commissioner*, 671 F.2d 167, 174 (6th Cir. 1982) (citing *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948)). Ultimate findings of fact, however, are subject to *de novo* review, as are the district court's conclusions of law, because they require the application of legal principles. *See Roth Steel Products* v. *Sharon Steel Corp.*, 705 F.2d 134, 143 & n.19 (6th Cir. 1983). We turn now to a review of the district court's factual and legal findings.

## I

As to Pembaur's claim against Whalen, the district court concluded that Whalen was entitled to at least a good faith immunity for his role in the events that led to the

lawsuit and that Whalen's actions had not violated any clearly established statutory and constitutional rights of Pembaur. Thus, the court held that Whalen could not be held liable for any damages.

On appeal, Pembaur concedes that Whalen was entitled to good faith immunity. He contends, however, that the district court erred in finding that Whalen's actions did not violate any clearly established constitutional right.

In *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Thus, before applying the shield of good faith immunity we must make two determinations. First, we must determine what the applicable law was at the time of the alleged violation. Second, we must determine whether that law was clearly established. *Id.*

In *United States* v. *McKinney,* 379 F.2d 259, 263 (6th Cir. 1967), we held that a search warrant is not necessary to execute an arrest warrant on the premises of a third party if the authorities have probable cause to believe that the suspect could be found on the premises. We reasoned that "even if we were to accept appellant's premise that a search warrant must be obtained in the absence of exceptional circumstances, there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant." Id. at 263 (footnote omitted). Pembaur asserts that this rule of law was changed in 1974 by this Court's opinion in *United States* v. *Shye,* 492 F.2d 886 (6th Cir. 1974). We disagree.

In *Shye,* we followed the D.C. and Fourth Circuits by



holding that a warrantless entry of a residence by authorities to effect an arrest was on the same constitutional footing as a warrantless entry to conduct a search; both are per se unreasonable absent exigent circumstances. 492 F.2d at 891, 893 (following *Dorman* v. *United States,* 435 F.2d 385 (D.C. Cir. 1970) (en banc); *Vance* v. *North Carolina,* 432 F.2d 984 (4th Cir. 1970)). We upheld the arrests in *Shye,* however, because we found that they were justified by exigent circumstances. *Id.* at 892. Pembaur's argument ignores a factual distinction between *Shye* and *McKinney;* the arrests in *Shye* were made *without* a warrant. The distinction is critical because *McKinney* indicated that the issuance of an arrest warrant itself could be "an exceptional circumstance obviating the need for a search warrant." 379 F.2d at 263. Consequently, *Shye* did not change the rule of *McKinney.* Indeed, that rule was not changed until four years *after* the actions complained of by Pembaur. *See Steagald* v. *United States,* 451 U.S. 204 (1981). Whalen's actions, therefore, did not violate any clearly established constitutional right. In fact, his instructions to the officers accorded with the law as it stood in 1977. Accordingly, he was entitled to the defense of good faith immunity and the dismissal of the damage claims against him was proper. No injunctive or declaratory relief was sought.

## II

Pembaur also sought to impose liability on the County for the actions of the Sheriff and the Prosecutor. The district court, however, concluded that the County could not be held liable for the policies of the Sheriff because the Sheriff was not subject to the control of the Board of Commissioners (Board), the County's governing body. The court reasoned that the Sheriff's powers and duties were

established by the state legislature, a fact which presumably rendered them state officials. Although the district court did not decide whether the County could be held liable for the policies of the Prosecutor, it did hold that Pembaur suffered no constitutional deprivation as a result of county policy or custom.[1]

In *Monell* v. *Department of Social Services,* 436 U.S. 658, 694 (1978), the Supreme Court held that a local government can be liable in a § 1983 action when its official policy or governmental custom is responsible for a deprivation of constitutional rights.[2] Apparently recognizing that a local government's "official policy" can originate from more than one source, the Court stated ". . . it is when execution of a government's policy or custom, *whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy,* inflicts the injury that the government as an entity is responsible under § 1983." *Id.* (emphasis added). *See also Owen* v. *City of Independence,* 445 U.S. 657-58 (1980). Thus, the Board's lack of control does not necessarily preclude a finding of liability on the part of the County. We must determine whether the nature and duties of the Sheriff are such

[1] Because it is clear that authorities may not legally search for the subject of an arrest warrant in the home or office of a third party without first obtaining a search warrants, *Steagald,* 451 U.S. 204 (1981), we must read this language as indicating that, in the district courts view, the obvious constitutional violation that occurred in this case did not result from the policy or custom of either the County or City.

[2] The Court in *Monell* specifically noted that the § 1983 liability may not be premised upon a respondeat superior theory. 436 U.S. at 691; *accord Local No. 1903 UAW* v. *Bear Archery,* 617 F.2d 157, 160 (6th Cir. 1980).



that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter.

Initially, we note that, the district court is incorrect to the extent that its decision implies that the Sheriff is not a County official. The Sheriff is elected by the residents of the County, OHIO REV. CODE ANN. § 311.01 (Baldwin 1982), and serves as the "chief law enforcement officer of the county." 1962 Op. Att'y Gen. No. 3109. He submits his budget requests to the Board, OHIO REV. CODE ANN. § 311.20, which in turn furnishes his office, books, furniture, and other materials. OHIO REV. CODE ANN. § 311.06. His salary and all training expenses are also paid out of the general county fund. OHIO REV. CODE ANN. §§ 325.01-06. Although none of these factors is itself determinative, we believe it is obvious that the Sheriff is a County official. Moreover, we believe that the duties of the Sheriff, as enumerated in OHIO REV. CODE ANN. § 311.67, and his responsibility for the neglect of duty or misconduct of office of each of his deputies, *see* OHIO REV. CODE ANN. § 311.05, clearly indicate that the Sheriff can establish county policy in some areas. We conclude, therefore, that, in a proper case, the Sheriff's acts represent the official policy of Hamilton County and, as such, may be the basis for the imposition of § 1983 liability.[3]

This, however, does not end our inquiry. To impose liability upon the county, Pembaur "must identify the policy, connect the policy to the [county] and show that the particular injury was incurred because of the execution of that policy." *Bennett* v. *City or Slidell,* 728 F.2d 762, 767 (5th Cir. 1984) (en banc). We believe that Pembaur failed to prove the existence of a county policy

[3] Although there appears to be no dispute, we also believe it is clear that the Prosecutor also establishes county policy.

in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion,* the Prosecutor and the Sheriff decided to force entry into his office. *See Rowland* v. *Mad River Local School District,* 730 F.2d 444, 451 (6th Cir. 1984). That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy.[4] Accordingly, the district court properly dismissed the claim against the County.

## III

We believe, however, that the district court erred in dismissing Pembaur's claim against the City. The district court concluded that the only policy or custom followed by officers of the Cincinnati Policy Division was that of aiding the deputies in the performance of their duties. This finding is clearly erroneous. Myron Leistler, the Chief of Police for Cincinnati, testified that the policy and past practice of his department was to use whatever force was necessary, including forcible entry, to serve a capias. He also testified that capiases are served routinely on the premises of persons who are not the subjects identified in the

[4] Pembaur's ratification theory is also insufficient to impose liability on the County. In *Turpin* v. *Mailet,* 619 F.2d 196 (2d Cir.), *cert. denied,* 449 U.S. 1016 (1980), which was cited by Pembaur, the Second Circuit recognized that a governmental policy could be established by ratification. That court held, however, that "absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, a policy could not ordinarily be inferred from a single incident of illegality . . . ." *Id.* at 202. Pembaur has failed to prove any prior pattern of conduct.



capiases. This testimony identifies the policy and connects that policy to the City. It is unclear, however, whether Pembaur's injury was incurred as a result of the execution of the policy. Because the district court erroneously identified the policy at issue, it did not make this determination. We therefore, remand this case to the district court to make this determination.

## IV

For the reasons outlined above, we AFFIRM the dismissal of the claims against Whalen and the County. The dismissal of the claims against the City is VACATED and the case is REMANDED for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 83-3325

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BERTOLD J. PEMBAUR, M.D.,

Plaintiff-Appellant,

v.

CITY OF CINCINNATI, et al.,

Defendants-Appellees.

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Before: KENNEDY and JONES, Circuit Judges; and COHN, District Judge.

**JUDGMENT**

(Filed October 18, 1984)

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ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, vacated in part and the case is remanded for proceedings consistent with this opinion.



Each party is to bear its own costs in this appeal.

ENTERED BY
ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

Issued as Mandate: November 12, 1984

A True Copy.

Attest:

/s/ HENRY MacARTHUR
Deputy Clerk